

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL SUIT NO. 26 OF 2019

MWANJE PONSIANO ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

KIMBUGWE FRED ::::::::::::::::::::::::::::::::::: DEFENDANT

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Plaintiff brought this suit against the Defendant on a claim for recovery of title of land comprised in Kabula Block 76 Plot 971 (the suit land) seeking the following orders;

- a) A declaration that the plaintiff is the lawful owner of the suit land comprised in Kabula Block 76 Plot 971
- b) A declaration that the registration of the defendant on the certificate of title for the suit land was done unlawfully and through fraud.
- c) An order that the Defendant's name be cancelled from the suit land (Kabula Block 76 Plot 971)
- d) An order that the plaintiff be re-registered on the certificate of title for the suit land comprised in Kabula Block 76 Plot 971 as its registered proprietor.
- e) An order that the defendant surrenders to the plaintiff the duplicate certificate of title for the suit land within such a time to be specified by court, failure of which an order be issued that the duplicate certificate of title for the suit land be cancelled and a special certificate be issued to the Plaintiff at the expense of the Defendant.

- f) An order of permanent injunction be issued against the defendant or anyone claiming through him restraining him from further claiming ownership of the suit land and never to interfere with the plaintiff's ownership, possession and use of the same.
- g) Punitive and exemplary damages be awarded against the defendant.
- h) General damages
- i) Costs of the suit
- j) Interest at the rate of 20% on (g), (h) and (i) from the date of judgment till payment in full.

The Plaintiff's claim is that in the year 2003, he purchased the suit land from a one Peter Kwesiga Kisokye. He was subsequently registered onto the Certificate of Title to the land as registered proprietor, and thereafter, trusted the Defendant with keeping safe custody of the Title. When he asked for the Title from the Defendant, the Defendant refused to give it back and following that, the Plaintiff checked the land registry where he discovered that the Defendant had unlawfully and fraudulently transferred the title to the suit land to himself without knowledge or consent of the Plaintiff. The Plaintiff reported the matter to Police and the Defendant was charged and convicted of the offences concealing a deed and obtaining registration by fraud contrary to Sections 278 and 312 of the Penal Code Act Cap 120, however, to date the Defendant is still unlawfully registered onto the Certificate of Title to the suit land.

This Court issued summons to file a defence and according to the affidavit of Maloba Brenda, the court process server attached to this Honorable Court, service of summons was effected on the Defendant's wife on the 25th day of April, 2019. Due to the Defendant's default in filing a defence despite the summons in this case being issued and served, this matter proceeded *ex parte* under ***Order 9 Rule 10 of the Civil Procedure Rules SI 71-1***.

In his scheduling notes, the Plaintiff raised three issues for the determination of court;

1. Whether the Defendant procured the registration of the suit land through fraud
2. Whether the suit land belongs to the Plaintiff
3. Whether the Plaintiff is entitled to the remedies sought

The Plaintiff led evidence of three witnesses by witness statements.

In his evidence PW1 Mwanje Ponsiano, the Plaintiff, stated that he purchased a *kibanja* situate on a one Patrick Kishokye's land, from the Defendant. The Defendant took him to the land owner, Patrick Kishokye, who then sold to the Plaintiff the suit land. The Plaintiff was then registered onto the land and he entrusted the Defendant to keep safe custody of the duplicate certificate of title. The Plaintiff lost the agreement on which he purchased the suit land. When he wanted to acquire a loan from the bank, he asked the Defendant for the Title but the Defendant frustrated him until the Plaintiff made a complaint to the Local leaders and the Defendant was later charged and convicted on counts of concealing a deed and obtaining registration by fraud. However, the Defendant still has never returned the Plaintiff's Certificate of Title and the Plaintiff has not been re-registered on the title.

PW2 Tendo Nathan Wevugira and LC1 Chairperson of Kasambya Village, Lyantonde Sub-County stated that in 2006, the Council received a complaint from the Plaintiff claiming that the Defendant had fraudulently transferred the suit land into his name. That after hearing both Parties, it was found that the Defendant was at fault as he had effected transfer without the Plaintiff's consent which was wrong. The Defendant was requested to re-instate the Plaintiff's name onto the title which he refused to do.

PW3 Tomusange George stated that he is a resident of Kasambya Village and knows that the Plaintiff bought the suit land from a one Patrick Kisokye and entrusted the Defendant with pursuing registration and later safe custody of the certificate of title. That unknown to the Plaintiff, the Defendant transferred the suit land into his names.

Counsel for the Plaintiff made written submissions and I will refer to them in my determination of the suit.

Determination of the suit;

Issue one; Whether the Defendant procured the registration of the suit land through fraud

In the case of ***Fredrick J. K Zaabwe v. Orient Bank & 5 O'rs, S.C.C.A. No. 4 of 2006*** (at page 28 of the lead judgment) Justice Katureebe JSC, relied on the definition of **fraud** in ***Black's Law Dictionary, (6th Ed) page 660*** which states as follows;

“An intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right... It comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another”.

Fraud in land transactions has to be attributable to the transferee either directly or by implication. (***David Sejjaaka v. Rebecca Musoke, Civil Appeal No. 12 of 1985***) The transferee must be guilty of some fraudulent act or must have known of such act by somebody else and participated in it or taken advantage of it.

The standard of proof in causes of action involving fraud as per the case of ***Ratilal Gordhanbhai Makanji [1957] EA 314*** is beyond mere balance of probability required in ordinary civil cases though not beyond reasonable doubt as required in criminal cases.

Counsel for the Plaintiff submitted relying on the Plaintiff's evidence in addition to the extract from the judgment of the Chief Magistrate's court in which the Registrar of Titles Masaka MZO testified that there was no transfer form from the Plaintiff to the Defendant on the file and also the instrument number reflected on the title was not for the Defendant but for a different person.

The Plaintiff has adduced evidence to prove that indeed Patrick Kishokye sold to him the suit land and a transfer form to that effect was also adduced in evidence. The Plaintiff also adduced evidence of a two copies of the certificate of title to the suit land, one (PEIII) showing the Plaintiff as the registered proprietor, and another (PEIV) showing the transfer from the Plaintiff to the Defendant as registered proprietor.

Furthermore this Court takes judicial notice of the judgment of H/W Matovu Hood in Criminal Case No. 334 of 2011 in which the Defendant was found guilty and convicted on two counts of concealing a deed (title to the land comprised in Block 76 Plot 972) contrary to Section 278 and Obtaining registration by fraud/false pretenses to the said title contrary to section 312 of the Penal Code Act.

I find the judgment of the Chief Magistrate in which the Registrar of Titles testified that there are no transfer documents justifying the transfer from the Plaintiff to the Defendant on file, and that the instrument number reflected on the registration of the Defendant is for a different transaction to be an indicator of fraud on the part of the Defendant as the transferee.

The Plaintiff's evidence which was corroborated by PW2 and PW3 is also sufficient to prove that the Defendant had no right or consent to transfer the suit land to himself.

As already noted, this evidence was never rebutted, there is a lower court judgment in a criminal matter where the defendant was convicted of obtaining registration on the certificate of title in question through fraud. This judgment was on a standard of proof beyond reasonable doubt which is even higher than the standard required in this case. No appeal was ever preferred in this judgment and so it is still standing.

I therefore find that the Plaintiff has sufficiently proved that the Defendant fraudulently transferred title to the suit land to himself.

Issue two; Whether the suit land belongs to the Plaintiff

Section 92 of the Registration of Titles Act gives power to the registered proprietor to transfer title in land and **Section 59 of the Registration of Titles Act** provides that the Certificate of Title is conclusive evidence of title. Once a person is registered as a proprietor of an estate of interest in land, his/her title cannot be defeated by any rival claims to the land except as prescribed by the Act.

Section 64 of the Registration of Titles Act provides that a proprietor of land shall, except in the case of fraud hold the land or interest in land subject to only such encumbrances as are notified on the folium of the register book.

The effect of fraud is that any Certificate of Title, entry, removal of encumbrance or cancellation in the register book procured or made by fraud shall be void against all parties or privies to the fraud. (**Section 77 Registration of Titles Act**)

Having established that the Defendant was fraudulently registered onto the title to the suit land as proprietor, his registration is therefore impeached by fraud. The Plaintiff is therefore the true owner of the suit land as he still holds an interest and good title to the suit land.

Issue three; Whether the Plaintiff is entitled to the remedies sought

The Plaintiff prayed for punitive, exemplary and general damages.

It is now trite that general damages are at the discretion of the court and are intended to place the injured party in the same position in monetary terms as he would have been had the act complained of not taken place. See **Phillip vs. Ward [1956] 1 AU ER 874**

The position of the law is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural consequence of the defendant's act or omission. **See: James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993. It was also held in Robert Cuossens v. Attorney General, S.C.C.A. No. 08 of 1999** that;

“The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered....”

A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong. *See: Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992.*

It is the Plaintiff's claim that he trusted the Defendant to have safe custody of the Plaintiff's Certificate of Title, but when he needed the title to secure a loan, the Defendant refused to give it back which led to the discovery that he had fraudulently transferred the land into his names.

The Plaintiff clearly incurred expenses in investigating the position of his title, instituting criminal proceedings against the Defendant and it also goes without saying that throughout the entire process, the Plaintiff was disgruntled and he suffered mental anguish. I will accordingly award general damages of **20,000,000/= (Twenty million shillings)**

The rationale behind the award of exemplary damages: exemplary damages should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct. (*see George Kiggundu v Attorney General (Civil Suit-2014/386) [2019] UGHCCD 189 (19 August 2019)*) Punitive or exemplary damages are awardable to punish, deter, express outrage of court at the defendant's malicious conduct

An award of exemplary damages should not be excessive. The punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal. Per Spry V.P. in *Obongo vs Municipal Council of Kisumu [1971] EA 91*. All circumstances of the case must be taken into account, including the behaviour of the plaintiff and whether the defendant had been provoked. See *O'Connor Vs Hewiston [1979] Crim. LR 46, CA; Archer Brown [1985] QB 401*

In the instant case, the Plaintiff trusted the Defendant to keep safe custody of his Certificate of Title but the Defendant maliciously and fraudulently transferred the title into his names. This was not only criminal but also malicious conduct which by failing to respond or file a defence to this suit, is an admission of guilt. Even after being convicted, the Defendant still refused to give to the Plaintiff his certificate of title. I therefore find it fitting that the Defendant is punished for his malicious actions and to that end award punitive/exemplary damages of **Ugx. 5,000,000/= (Uganda Shillings Five Million)**.

Having found that the Defendant obtained registration on the certificate of title through fraud I hereby declare and order as follows:

- i) The Plaintiff is the lawful owner of the suit land comprised in Kabula Block 76 Plot 971;
- ii) The registration of the Defendant on the Certificate of Title to the suit land was done unlawfully and through fraud;
- iii) The entry effecting registration of the Defendant on the Certificate of Title to the suit land should be cancelled;
- iv) The Plaintiff's name should be entered onto the Certificate of Title for the suit land comprised in Kabula Block 76 Plot 971 as registered proprietor;
- v) The Defendant should surrender to the Plaintiff the Duplicate Certificate of Title to the suit land within 07(seven days) from receipt of a copy of the Order of this court,
- vi) Upon failure to adhere to the order in v) above, the Defendant's Title should be cancelled for fraud, and the Plaintiff shall be at liberty to apply for and be issued with a Special Certificate of Title to the suit land at the expense of the Defendant;
- vii) A Permanent Injunction is hereby issued against the Defendant or anyone claiming through him restraining him from further claiming ownership of the suit land and never to interfere with the Plaintiff's ownership, possession and use of the suit land;

- viii) General damages of 20,000,000/= (Twenty Million Shillings)
- ix) Punitive/exemplary damages of 5,000,000/= (Five Million Shillings)
- x) Interest at the court rate on viii and ix above, from the date of judgment until full payment.
- xi) Costs of the suit are awarded to the Plaintiff

I so order.

Dated, signed and delivered by email at Masaka this 5th day of August, 2021.

Signed; _____

Victoria Nakintu Nkwanga Katamba

Judge